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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 404

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,

Debtor.

W. D. WITTER AND J. MARSHALL PEER,

Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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THE "FACTS".

Respondents state (p. 2) that petitioners' statement that the 1936 Petition was filed by two of the officers of the corporation without authority from its Directors is in-

accurate because the "record shows" that it was filed by the "authorization" of the Directors. Their reference to Page 55 of the Record is merely to the statement contained in the Petition. The evidence, however, was that this statement was incorrect and that no Meeting was held authorizing the filing of the Petition (R. 30). If it be conceded, for argument (as respondents contend) that the corporation was not in possession of its business from 1933 (prior to dissolution) up to and including the appointment of the Bankruptcy Trustee in 1936 (subsequent to dissolution), then it is evident that *at no time was there an unincorporated company in esse* capable of being reorganized under Chapter X, since the *alleged* "unincorporated company" was *non-existent* either prior to dissolution or subsequent thereto. No matter what position respondents choose to take, the Peer Manor Building Corporation was *not* an "unincorporated" company.

THE "ARGUMENT".

I.

Former Adjudication.

The contention (p. 4) that "*res adjudicata* or *estoppel by judgment*" required "two indispensable elements: (1) Identity of parties" and (2) "Identity of issues", is founded on a *confusion* of the term "*res adjudicata*" with the term "*estoppel by judgment.*" The latter requires the identity of issues, while the former does *not* require the identity of issues. This was pointed out in the Petition (p. 21). The distinction clearly appears in two recent decisions decided by the Illinois Supreme Court. In *Espadron* v. *Davis*, 385 Ill. 304, the Court pointed out the "*wide difference*" between "*res adjudicata*" and "*estoppel by judgment*", and that the former is "conclusive" not only as to every matter which was offered to sustain or defeat the claim or demand but as to any other matter which might have been offered for that purpose, while the latter is confined to the "issue" which was presented to the Court. This was reiterated in *Normal State Bank* v. *Killian*, 386 Ill. 449, 456. In the case at bar the action was between the *same parties* based on the *same claim or demand*, being the bonds secured by the Trust Indenture. The same property is involved. The same debtor is sought to be rehabilitated. The defense of *res adjudicata* was, therefore, a complete bar to the second Petition, as held by the District Court, and the Circuit Court of Appeals clearly erred in reversing the lower Court and its decision is in *conflict* with the Illinois Law.

Respondents, who complain of inconsistency at page 24 of their Answer to Petition 405-6 should have at least been

consistent themselves and not blow hot and cold at the same time. They do so when they say in one breath (p. 5) that the decision on the former appeal, that the debtor could not be reorganized under Chapter X was on the ground that the Peer Manor Building Corporation "was no entity" which could be proceeded against under the Illinois law, and when they say in the next breath (p. 12) that absence of "an entity" under Illinois law is no obstacle to Federal proceedings in Bankruptcy.

In answer to the point that the respondents are the *identical parties* against whom it was adjudicated that the Peer Manor Building Corporation could not be reorganized a corporation, respondents say (p. 5) "Granted that we have some of them, this is not enough." They do not say who are some of the other parties. A reference to their First Petition and to the Second Petition discloses that *the parties are identical.* Only by a resort to a *confusion* of the defense of *res adjudicata* with that of *estoppel by judgment,* do they argue that the former adjudication is no bar to this action.

Their illustration (p. 5) of a suit of "Jones v. Smith" with a suit of "Jones v. Robinson" is not in point because there, "Smith" and "Robinson" are *different* persons, while here, the property which was sought to be reorganized, the Peer Manor Building Corporation, is *identical.* This was not a suit in *personam* to hold "Smith" liable on a "note" and later to hold "Robinson" liable on the note executed by "Smith", as argued by counsel, but was a suit to reorganize the identical property secured by the same bond issue upon which neither the Peer Manor Building Corporation, as a corporation, nor as an unincorporated company, was liable, since the bonds were executed by Peer, individually. It was a proceeding to reorganize the *res* which *res* was involved in both proceedings. The

same nonexistent entity is sought to be rehabilitated. The parties were identical, the property was identical, and the relief was identical.

Respondents *concede* (p. 7) that they asked for the identical relief in their Petition for Rehearing on the former appeal, which was denied. The identical issue was, therefore, decided on the former appeal, and this was a complete bar to the new action, as held by the District Court. It was the duty of the Court of Appeals to sustain the judgment.

II.

Rule 52 Is Applicable in Bankruptcy.

In answer to petitioners' argument that the findings of the District Court which heard the witnesses were binding and conclusive on the Court of Appeals on the point that the Peer Manor Building Corporation was not an unincorporated company, respondents claim (p. 5) that Rule 52 is inapplicable to Bankruptcy. *The contrary was held by this Court* in *Kelly* v. *Everglade,* 319 U. S. 415. See also, *Perry* v. *Bauman,* 122 F. (2d) 409, which is *decisive* on this issue.

III.

The Individual Liability Is Determinative of the Jurisdiction.

Respondents contend (pp. 8-9) that even if the members of the alleged unincorporated company are individually liable as partners, such a company may still be reorganized under Chapter X pursuant to § 1(8). This runs counter to the provision of the section which *limits* associations to cases where "the capital subscribed" is "*alone*" responsible for the debts of the association. Because of

this expressed provision of the Statute, their argument (p. 9) that Congress, by enacting the Statute, had set up its own definition of a corporation, is devoid of merit for the reason that *it excluded associations whose members are individually liable* under State law.

IV.

The Debtor Status as an Entity Is in Issue.

The contention (p. 10) that the status of the Peer Manor Building Corporation as an entity is not an issue is completely without any basis. In view of the statutory provision that a partnership or association must be one where the capital stock limits the obligation of the members, it is evident that Congress referred to a legal entity and *not* to an association which under the local law is not an entity and whose members are held individually liable. The same reasoning which prompted the Seventh Circuit to reverse the decree reorganizing the debtor because it was not a legal entity, is applicable to the same company as an alleged unincorporated company which, under the State law, is not a legal entity.

Chapter X contemplates the rehabilitation of an entity. If the entity has no recognition under State law then there is no subject matter for reorganization under Chapter X.

We have shown in our petition that under the Illinois law there existed at most a partnership with individual liability and that consequently there was neither a corporation, association or unincorporated company, where the members thereof limited their liability.

That the Federal courts will follow the local law as to what constitutes an entity is decided by the cases cited in our petition.

V.

The Conflict in the Decisions.

The question whether there is a conflict between the decisions in the instant case (143 F. (2d) 769) and the decision of the First Circuit (124 F. (2d) 132) as urged in the Petition (pp. 32-37), which is denied by the respondents, can best be answered by a reading of the two decisions. With all their ingenuity, they cannot reconcile the two decisions in construing Section 1 (8) of the Bankruptcy Act.

VI.

The Peer Manor Building Company Is Not an Unincorporated Company.

The argument of the respondents (pp. 14, 15) to convince the Court that the Peer Manor Building Company is an unincorporated company, tends to show that two of its officers conducted the business as *a corporation* and *not* as an unincorporated company. On the factual issues, the findings of the District Court were conclusive under Rule 52, as held by this Court in *Kelly* v. *Everglade, supra.*

The "Conclusion."

The "conclusion" of the respondents' is unsupported by any of the authorities. The District Court was correct in its judgment that the decision on the former appeal, between the same parties involving the same subject matter and seeking the identical relief, was a complete bar to the second Petition. The decision of the Circuit Court of Appeals reversing the order below was in conflict with the decisions of this Court and with the decisions of other

Circuits, and, therefore, the Writ of Certiorari should be issued.

Respectfully submitted,

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